Supreme Court, U.S.
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No. (1) 08-878 2 - 2009

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In The

Supreme Court of the United States

GABRIEL CRUZ-GARCIA,

Petitioner,

v.

MICHAEL B. MUKASEY,
Attorney General,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Gabriel Cruz-Garcia ("Petitioner"), a lawful permanent resident of the United States for over 32 years, is subject to a final order of removal based solely on a 1979 conviction for violation of 21 U.S.C. § 841(a)(1), distribution of cocaine. This conviction resulted from Petitioner's decision to exercise his right to a jury trial. The agency decisions below held that Petitioner is statutorily ineligible to apply for relief from removal under former 8 U.S.C. § 1182(c). On July 11, 2008, the Ninth Circuit Court of Appeals denied Petitioner's petition for review, holding that, pursuant to its decision in *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002), as well as other Ninth Circuit decisions in which it has interpreted this Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), only aliens who entered a plea of guilty or no contest prior to the repeal of 8 U.S.C. § 1182(c) remain eligible to apply for such relief. To date, ten circuits have considered this issue and have reached several conflicting results.

On November 20, 2008, the lower court denied Petitioner's petition for rehearing en banc. Also on November 20, 2008, the lower court decided *Abebe v. Mukasey*, 548 F.3d 787, 791 (9th Cir. 2008), where it held that persons seeking relief from deportation are not eligible to apply for relief under 8 U.S.C. § 1182(c). The Ninth Circuit position in *Abebe* conflicts with that of every other court that has considered this issue.

QUESTION PRESENTED – Continued

Petitioner is directly affected by *Abebe* because he is seeking to waive grounds of removability under § 1182(c) and his case arises in the Ninth Circuit.

The question presented is whether a lawful permanent resident, who is removable based on a conviction by jury trial, and who remained, even after the conviction, statutorily eligible for relief from removal under the then-existing 8 U.S.C. § 1182(c), and who now faces removal proceedings initiated after the repeal of the statute, continues to remain eligible for that relief.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Gabriel Cruz-Garcia, by and through undersigned counsel, respectfully petitions for a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals in Petitioner's petition for review is unpublished (Case No. 06-74109) (App. 1). The decision is reported at 285 Fed. Appx. 446 (July 11, 2008). The opinion of the Ninth Circuit Court of Appeals in Petitioner's petition for rehearing en banc is also unpublished (Case No. 06-74109) (App. 9). The opinions of the Board of Immigration Appeals (App. 3) and the Immigration Judge (App. 5) are also unpublished.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 2008. Rehearing was denied on November 20, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), enacted in 1952, granted

the Attorney General the authority to admit in its discretion excludable aliens "lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily, and not under order of deportation, who are returning to a lawful unrelinquished domicile of seven consecutive years." Following its enactment, the Board of Immigration Appeals extended § 212(c) to the deportation context on equal protection grounds. *See Matter of G.A.*, 7 I. & N. Dec. 274 (BIA 1956) and *Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976). Section 212(c) was repealed in 1996, but this Court held in *INS v. St. Cyr*, 533 U.S. 289, 325 (2001) that the repeal could not be retroactively applied to persons with settled expectations of the possibility of such relief.

STATEMENT

A. Introduction

Title 8, U.S. Code § 1182(c), or Immigration and Nationality Act (hereinafter "INA" § 212(c)) (known as "§ 212(c) relief"), was enacted with the passage of the Immigration and Nationality Act of 1952. Pursuant to the statutory language of the provision, it applied only to aliens in exclusion proceedings. However, in 1956, the Board of Immigration Appeals (hereinafter "the Board") extended § 212(c) relief to those aliens in deportation proceedings who had temporarily proceeded abroad and reentered the U.S. following their deportable offenses. *See Matter of*

G.A., 7 I. & N. Dec. 274 (1956). In *Matter of G.A.*, the Board relied on its reasoning in *Matter of L*, 1 I. & N. Dec. 1, 5 (BIA 1940), where it had held that § 212(c)'s precursor, the Seventh Proviso to Section 3 of the Immigration Act of 1917, 39 Stat. 874 (hereinafter "the Seventh Proviso"), had to be extended to aliens in deportation proceedings, noting that, to strictly limit the Proviso to exclusion proceedings would be "capricious and whimsical."

In *Francis v. INS*, 532 F.2d 268 (2nd Cir. 1976), the Second Circuit Court of Appeals took this interpretation to its logical conclusion and held that § 212(c) relief must be available to all persons in deportation proceedings, regardless of whether they had traveled abroad and reentered the country subsequent to their deportable offenses. In the same year, the Board adopted the *Francis* analysis in *Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976). Subsequently, every court to consider the issue, including the Ninth Circuit in *Tapia-Acuña v. INS*, 640 F.2d 223 (9th Cir. 1981) (overruled by *Abebe v. Mukasey*, 548 F.3d 787, 791 (9th Cir. 2008)), has adopted the *Francis* analysis and determined that due process requires that § 212(c) must be applied to deportation proceedings as well as exclusion proceedings. *See Joseph v. INS*, 909 F.2d 605, 606 n.1 (1st Cir. 1990); *Casalena v. INS*, 984 F.2d 105, 106 n.3 (4th Cir. 1993); *Ghassan v. INS*, 972 F.2d 631, 633 n.2 (5th Cir. 1992); *de Gonzalez v. INS*, 966 F.2d 804, 806 (6th Cir. 1993); *Leal-Rodriguez v. INS*, 990 F.2d 939, 949 (7th Cir. 1993); *Vissian v. INS*, 548 F.2d 328 n.3

(10th Cir. 1977); *Yeung v. INS*, 76 F.3d 337, 341 (11th Cir. 1996) (extending the *Francis* analysis to allow persons in deportation proceedings to apply for a § 212(h) waiver).

The Ninth Circuit's recent decision in *Abebe* represents a dramatic break from this deeply rooted, longstanding agency and judicial precedent. It has implicitly cast doubt upon the constitutionality of 8 C.F.R. § 1212.3, a federal regulation promulgated by the Department of Homeland Security (DHS), and has also created an irreconcilable circuit split. As such, this Court's intervention is clearly required.

There also exists an irreconcilable circuit split in regard to whether lawful permanent residents who exercised their right to trial by jury, and were subsequently convicted of deportable offenses, prior to the 1996 amendments to, and repeal of § 212(c), remain eligible for such relief.

In *INS v. St. Cyr*, 533 U.S. 289 (2001), this Court held that lawful permanent residents who accepted plea agreements, and were thereby convicted of deportable offenses, prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996) (hereinafter "AEDPA") and the Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) (hereinafter "IIRIRA"), remain eligible for § 212(c) relief. The Court in *St. Cyr* did not address the issue of whether those who were convicted after exercising

their right to trial also remain eligible for such relief, which they always had been eligible for prior to the repeal of the statute in 1996. Since *St. Cyr* was decided, ten circuits have considered this issue and have reached several conflicting results.

This conflict among the circuits predominantly concerns the issue of whether or not this Court in *St. Cyr* imposed a requirement of reliance on the prior state of the law in order to find that a statute enacted subsequent to completed conduct has a retroactive effect. Ten of the eleven circuit courts have decided this issue with several different results. The Third and Fourth Circuits have determined that there is no reliance requirement. *See Atkinson v. Attorney General of the United States*, 479 F.3d 222, 231 (3rd Cir. 2007) and *Olatunji v. Ashcroft*, 387 F.3d 383, 396 (4th Cir. 2004). The Sixth, Ninth, and Tenth Circuits have determined that an objective, reasonable reliance is required. *See Thaqi v. Jenifer*, 377 F.3d 500, 504 n.2 (6th Cir. 2004); *Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 940 (9th Cir. 2007); *Hem v. Maurer*, 458 F.3d 1185, 1197 (10th Cir. 2006). The First, Second, Fifth, and Eleventh Circuits have imposed an individual, subjective reliance requirement. *See Dias v. INS*, 311 F.3d 456, 458 (1st Cir. 2002), *cert. denied*, 539 U.S. 926 (2003); *Rankine v. Reno*, 319 F.3d 93, 100 (2nd Cir. 2003), *cert. denied*, 540 U.S. 910 (2003); *Hernandez-Castillo v. Moore*, 436 F.3d 516, 519-520 (5th Cir. 2006); *Brooks v. Ashcroft*, 283 F.3d 1268, 1274 (11th Cir. 2002). The Seventh Circuit has gone even further in requiring a showing of a *quid pro quo*

agreement. *See Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004). This circuit split is clearly irreconcilable and requires this Court's intervention.

Moreover, the lower court's decision in finding Petitioner ineligible to apply for § 212(c) relief violates his right to equal protection under the law because it creates an arbitrary distinction between lawful permanent residents who accepted guilty pleas and those who exercised their right to trial, regardless of the severity of their respective offenses or deservedness of discretionary relief. The Court's decision in *Abebe*, which eliminated § 212(c) relief for lawful permanent residents in removal proceedings, also violates Petitioner's right to equal protection as the decision allows for the disparate treatment of similarly situated individuals on the basis of irrelevant and fortuitous factors, i.e., whether they happen to be in deportation or exclusion proceedings.

A very significant number of cases would be potentially impacted by the resolution of these issues. Under the Ninth Circuit Court's decision in *Abebe*, the federal regulation at 8 C.F.R. § 1212.3, which has been applied in thousands of cases and is applicable to thousands more currently pending cases, cannot survive. *See Abebe*, 548 F.3d at 800 (Thomas, J., dissenting).

Furthermore, as approximately 57,000 convictions are obtained through jury trials each year,[1] a very significant number of cases would potentially be impacted by the resolution of the issue of whether aliens who exercised their right to trial and were subsequently convicted of deportable offenses prior to the enactment of AEDPA and IIRIRA remain eligible for § 212(c) relief. These are profoundly important issues because they affect thousands of lawful permanent residents – the great majority of whom, like Petitioner, have lawfully resided in the U.S. for decades and have deep ties to this country – who are seeking relief from removal. Therefore, the instant case warrants this Court's review.

B. Statutory Background

1. Pre-AEDPA Law

Section 212(c) of the INA was enacted with the passage of the Immigration and Naturalization Act of 1952. Like its precursor, the Seventh Proviso, § 212(c) was facially limited to aliens in exclusion proceedings. However, in 1956, the Board of Immigration Appeals in *Matter of G.A.*, 7 I. & N. Dec. 274 (1956),

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[1] *See Compendium of Federal Justice Statistics, 2004*, Bureau of Justice Statistics, United States Department of Justice (December 2006); *State Court Sentencing of Convicted Felons, 2004*, Bureau of Justice Statistics, United States Department of Justice (July 2007). These statistics exclude misdemeanor convictions; the actual number of persons convicted at trial per year is thus considerably higher.

extended § 212(c) relief to lawful permanent residents in deportation proceedings who had departed and returned to the U.S. subsequent to the time the ground for deportation arose, on equal protection grounds.

In *Matter of Arias-Uribe*, 13 I. & N. Dec. 696 (1971), the Board declined to extend § 212(c) relief to lawful permanent residents in deportation proceedings who had not departed the country after the deportation ground arose. In *Francis v. INS*, 532 F.2d 268 (2nd Cir. 1976), the Second Circuit Court of Appeals struck down this interpretation of § 212(c) as a violation of aliens' constitutional right to equal protection under the law and held that § 212(c) relief must be available to all persons in deportation proceedings, not merely those who had left the country and reentered. That same year, the Board embraced the *Francis* analysis in *Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976).

The Ninth Circuit Court of Appeals in *Tapia-Acuña v. INS*, 640 F.2d 223, 225 (9th Cir. 1981) held that "eligibility for [§ 212(c)] relief cannot constitutionally be denied to an otherwise eligible alien who is deportable under [§ 241], whether or not the alien has departed from and returned to the United States after the conviction." Notably, the Ninth Circuit in *Tapia-Acuña* had initially denied § 212(c) relief to the alien on the basis that he was in a deportation proceeding. *See Abebe*, 548 F.3d at 798 (Thomas, J., dissenting). However, the issue was so well-settled that the Supreme Court granted certiorari and remanded

the case for the Ninth Circuit Court to reconsider on the basis of the Solicitor General's position in its brief before the Supreme Court. *Id.* "The Solicitor General's Brief on Petition for Writ of Certiorari asserted 'the government's current position that those precedents [which limit section 212(c) to exclusion proceedings] are erroneous and should be overruled.'" *Id.*, quoting *Tapia-Acuña v. INS*, 449 U.S. 945, 101 S.Ct. 344, 66 L. Ed. 2d 209 (1980). On remand, the Ninth Circuit reversed its initial position and followed *Francis*.

Pursuant to the above agency and judicial interpretations of § 212(c), prior to AEDPA, the majority of lawful permanent residents rendered deportable due to their criminal convictions were eligible to apply for discretionary relief under § 212(c) if they had seven consecutive years of residency and if they had not served a term of imprisonment of five years or more for aggravated felony convictions, regardless of whether they had departed and reentered the country following their convictions for deportable offenses. 8 U.S.C. § 1182(c) (1994). Over half of all such applications were granted. *See St. Cyr*, 533 U.S. at 296 n.5.

2. AEDPA

Congress enacted AEDPA on April 24, 1996, which rendered aliens with certain classes of criminal convictions, including aggravated felonies, statutorily ineligible for § 212(c) relief. *See* AEDPA § 440(d).

3. IIRIRA

On September 30, 1996, Congress enacted IIRIRA, which went into effect on April 1, 1997. IIRIRA repealed § 212(c), replacing it with the more restrictive cancellation of removal provision under 8 U.S.C. § 1229b(a), INA § 240A(a), which precludes lawful permanent residents convicted of aggravated felonies from discretionary relief from removal.

In *St. Cyr*, this Court found that the amendments to, and repeal of § 212(c) did not eliminate eligibility for relief for those who were convicted by plea prior to the enactment of AEDPA and IIRIRA. *See St. Cyr*, 533 U.S. at 326. The Court did not reach the more general question of whether § 212(c) relief is still available to persons who were convicted by other means, including jury trials. The Circuits remain irreconcilably split over this more general question.

4. 8 C.F.R. § 1212.3

On October 28, 2004, the Department of Homeland Security promulgated 8 C.F.R. § 1212.3, codifying the U.S. Supreme Court's decision in *St. Cyr*. The regulation authorizes persons who pled guilty or nolo contendere to their convictions prior to the enactment of IIRIRA to apply for § 212(c) relief "regardless of whether the alien is in exclusion, deportation, or removal proceedings." *See* 8 C.F.R. § 1212.3(h)(1), (2).

5. *Abebe v. Mukasey*

In *Abebe*, *supra*, the Ninth Circuit Court of Appeals reversed 52 years of agency precedent by upholding the statutory scheme enacted by Congress in 1952, the same scheme which the Board of Immigration Appeals rejected as unconstitutional in 1956, in *Matter of G.A.*, 7 I. & N. Dec. 274. *See also Matter of L*, 1 I. & N. Dec. 1, 5 (BIA 1940) (where the Board rejected the Seventh Proviso, reasoning that strictly limiting the Seventh Proviso to exclusion proceedings would be "capricious and whimsical.")

C. Statement of Facts

Petitioner Gabriel Cruz-Garcia, 58, is a citizen and national of Mexico. A.R. at 78.[2] He became a lawful permanent resident of the United States on September 6, 1976, 32 years ago, at the age of 26. A.R. at 49.

In 1979, Petitioner was indicted on three counts of violating 21 U.S.C. § 841(a)(1), distribution of cocaine. A.R. at 100-102. He entered a plea of not guilty on all three counts and exercised his constitutional right to a jury trial.[3] On October 26, 1979, in

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[2] A.R. refers to the Certified Administrative Record that was submitted to the Ninth Circuit for *Cruz-Garcia v. Mukasey*, case number 06-74109.

[3] It is not clear from the record whether Petitioner was offered a plea agreement and affirmatively turned it down. However, it is extremely unlikely that he was not offered one,

(Continued on following page)

the United States District Court for the Southern District of California, the jury found Petitioner guilty on all three counts. He was sentenced to 15 years in the custody of the Attorney General; however, the court ordered that Petitioner be imprisoned for 179 days and suspended the execution of the remainder of the sentence. A.R. at 96. Petitioner was placed on probation for five years. *Id.*

D. Procedural History

On January 25, 2005, more than twenty-five years after his conviction, Petitioner was served with a Notice to Appear, charging him as removable under 8 U.S.C. § 1227(a)(2)(B)(i), as an alien convicted of a violation of a law of the United States relating to a controlled substance. A.R. at 117. Petitioner's removal hearing was held on three dates between April 19, 2005 and August 1, 2005. A.R. at 53-75. On August 1, 2005, at a Master Calendar hearing, the Immigration Judge pretermitted Petitioner's application for § 212(c) relief pursuant to the Ninth Circuit Court of Appeals' decision in *Armendariz v. Sonchik*, 291 F.3d 116 (9th Cir. 2002), *cert. denied*, 539 U.S. 902 (2003), where the Ninth Circuit Court held that individuals convicted at jury trial were barred from seeking

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given that approximately ninety-four percent of federal criminal convictions result from guilty pleas. *See Compendium of Federal Justice Statistics, 2004, supra*, note 1. Any informational gaps that may exist in the record regarding this issue may easily be filled by remanding the case.

§ 212(c) relief (App. 5). On August 4, 2006, the BIA affirmed the decision of the Immigration Judge (App. 3), citing *Armendariz* and *Kelava v. Gonzales*, 434 F.3d 1120, 1124-25 (9th Cir. 2006).

On August 21, 2006, Petitioner filed a Petition for Review with the Ninth Circuit Court of Appeals of the BIA's decision. On July 11, 2008, the court denied Petitioner's petition for review, citing its decisions in *Armendariz* and *Saravia-Paguada v. Gonzales*, 488 F.3d 1122 (9th Cir. 2007) (App. 1). The Court further held that Petitioner had not established an equal protection violation, reasoning that he is not similarly situated, for purposes of § 212(c) relief, to those aliens whose pled guilty to their offenses. *Id.*

On August 25, 2008, Petitioner filed a petition for rehearing en banc before the Court of Appeals. On November 20, 2008, the Court denied Petitioner's petition for rehearing en banc (App. 9).

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit Has Decided The Important Issue Of Whether Aliens Rendered Removable On The Basis Of Pre-AEDPA And Pre-IIRIRA Convictions Remain Eligible For § 212(C) Relief In A Way That Violates Equal Protection, Calls Into Question The Constitutionality Of A Federal Regulation, And Conflicts With The Board Of Immigration Appeals' Position On The Issue, As Well As With The Decisions Of All Other Courts Which Have Considered This Issue.

On November 20, 2008, the same date on which the Ninth Circuit Court of Appeals denied Petitioner's petition for rehearing en banc, the Court issued its decision in *Abebe v. Mukasey*, 548 F.3d 787, 791 (9th Cir. 2008), where it held that it is not a violation of the Equal Protection Clause to afford permanent residents relief from inadmissibility under § 212(c), but not deportation, and thus upheld the statutory scheme which provides discretionary relief only to aliens in exclusion proceedings. In so holding, the lower court overruled its own decision in *Tapia-Acuña v. INS*, 640 F.2d 223 (9th Cir. 1981), as well as over 60 years of agency precedent. *Id.* at 792 (Clifton, J., concurring). *See also Matter of L*, 1 I. & N. Dec. 1 (1940) (where the Board of Immigration Appeals held that the Seventh Proviso was exercisable in a deportation proceeding where the alien had departed and returned to this country subsequent to the time the ground for deportation arose, reasoning that, strictly

limiting the provision to exclusion proceedings would be "capricious and whimsical.")

The Supreme Court has long held that the constitutional promise of equal protection of the laws applies to aliens as well as citizens. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Under the minimal scrutiny test, which is applicable in this case, distinctions between different classes of persons "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Stanton v. Stanton*, 421 U.S. 7, 14 (1975).

In this instance, there is absolutely no rational basis whatsoever for treating persons in exclusion proceedings differently from those in deportation proceedings. *See Francis v. INS*, 532 F.2d 268, 273 (2nd Cir. 1976) ("Reason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time.") The lower court's reasoning that Congress could have rationally made § 212(c) relief available only to aliens in exclusion proceedings in order to encourage "self-deportation" is flawed because it conflicts with the statute itself, which provides for discretionary relief for "a group of aliens whom Congress has deemed worthy of to remain in this country, in spite of having been convicted of particular crimes." *Abebe* 548 F.3d at 799 (Thomas, J., dissenting). Thus,

because there is no rational basis to support this disparate treatment, it cannot be sustained.

The Ninth Circuit's decision in *Abebe* also "implicitly casts considerable doubt on the constitutionality of a federal regulation," i.e., the regulation found at 8 C.F.R. § 1212.3, which was promulgated by the DHS to codify the holding in *St. Cyr*. *Abebe*, 548 F.3d at 800 (Thomas, J., dissenting). Title 8 of the Code of Federal Regulations, section 1212.3(f)(5) "provides that, assuming an alien in a deportation proceeding meets other requirements, the alien is eligible for section 212(c) relief unless '[t]he alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.' . . . The regulation thus proceeds on the long-standing assumption . . . that section 212(c) is applicable to both deportation and exclusion proceedings." *Id.*

As the dissenting judge in *Abebe* points out, "By holding that the statutory language of section 212(c) is clear and that *Francis* and *Tapia-Acuña* did not 'accord sufficient deference' to Congress, the majority has implicitly questioned the DHS's authority to enact the above regulation. . . . Under the majority rule, the regulation that has been applied in thousands of cases cannot survive." *Abebe*, 548 F.3d at 800 (Thomas, J., dissenting) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

Finally, the Ninth Circuit's decision in *Abebe* conflicts with every other court to consider this

well-settled issue and has created a split among the circuit courts. *See id.* at 798. Only this Court can resolve these constitutional issues which are raised by the Ninth Circuit's decision in *Abebe*; therefore, this Court's review is warranted.

B. The Ninth Circuit Has Decided The Important Issue Of Whether Aliens Convicted By Jury Trial Pre-AEDPA And Pre-IIRIRA Remain Eligible For § 212(C) Relief In A Way That Conflicts With This Court's Decisions In *Landgraf v. USI Film Products*, *Hughes Aircraft Company v. Ex Rel. Schumer*, *Martin V. Hadix*, And *INS v. St. Cyr*, And Which Is In Direct Conflict With Other Circuits.

The Ninth Circuit's ruling in this case contravenes this Court's retroactivity analysis, as established by *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and as applied in *Hughes Aircraft Company v. U.S. ex rel. Schumer*, 520 U.S. 939 (1997), *Martin v. Hadix*, 527 U.S. 343 (1999) and *St. Cyr*, *supra*, and is in direct conflict with the Third Circuit's ruling in *Atkinson v. U.S. Attorney General*, 479 F.3d 222, 227-28 (3rd Cir. 2007). The Ninth Circuit's erroneous application of this Court's retroactivity analysis to a matter of national importance, and the irreconcilable conflict among the circuits on this issue, warrants this Court's review. As ten of the eleven circuits have now addressed this issue, this fundamental split is now ripe for a uniform resolution by this Court.

1. This Court Has Never Required A Showing Of Actual Reliance In Order To Find Impermissible Retroactive Effect.

a. The Presumption Against Retroactivity

This Court has established and consistently applied a presumption against the retroactive application of newly enacted civil legislation to prior conduct. The presumption against retroactivity reflects the fundamental concern that that people "should have an opportunity to know what the law is and to conform their conduct accordingly." *Id.* at 265. As the learned Justice Story observed, the Supreme Court has long disfavored retroactive statutes because "[r]etrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 533 (1998) (quoting 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891)).

In *Landgraf*, this Court established a two-prong test for determining whether the presumption against retroactivity precludes the application of a new statute to prior conduct. *Landgraf*, 511 U.S. at 280. The Court first looks for a clear statement from Congress that a statute is to be applied retroactively. In the absence of a clear command, the court must next determine whether the retroactive application of the new law "would have retroactive effect, i.e., whether it would impair rights a party possessed

when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* In turn, if the Court finds that the new statute does have "retroactive effect," the Court must give effect to the traditional presumption that Congress did not intend for it to apply to prior conduct. *Id.* This presumption against retroactivity is "deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at 265.

As the Third Circuit has correctly observed, this Court "has never held that reliance on prior law is an element required to make the determination that a statute may be applied retroactively." *Atkinson*, 479 F.3d 227-28. Rather, the inquiry under *Landgraf* is whether the application of the new law "'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past . . . " *Landgraf*, 511 U.S. at 269. Although reliance on settled expectations may provide guidance for a court in considering the retroactivity of a new law, it is but one of a number of factors used to determine whether the law may be applied to past conduct. *See Landgraf*, 511 U.S. at 270 ("The judgment whether a particular statute acts retroactively should be *informed and guided* by familiar considerations of fair notice, reasonable reliance, and settled expectations.") (emphasis added). *See also Atkinson*, 479 F.3d at 231 ("Nowhere in the Supreme Court's jurisprudence . . . has reliance (or

any other guidepost) become the *sine qua non* of the retroactive effects inquiry. . . . [R]eliance is but one consideration in assessing whether a statute attaches new legal consequences to past events.")

This Court has established that resolving whether a statute has retroactive effect "demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *St. Cyr*, 533 U.S. at 321 (quoting *Landgraf*, 511 U.S. at 270). As such, the *Landgraf* line of cases has established a practical, case-by-case, framework for retroactivity analysis, which reflects this Court's presumption *against* retroactivity. The lower courts which impose a reliance requirement are in conflict with this Court's decisions in that they effectively treat "*Landgraf* as establishing a presumption *in favor* of retroactive application," which is clearly wrong. *Ponnapula v. Ashcroft*, 373 F.3d 480, 491 (3rd Cir. 2004).

The *Landgraf* line of cases, which include *Landgraf*, *Hughes Aircraft*, *Hadix*, and *St. Cyr*, each illustrate that this Court has never imposed a reliance requirement on the determination of whether a statute may be applied retroactively.

The case in *Landgraf* dealt with the Civil Rights Act of 1991, which added compensatory and punitive damage remedies to certain Title VII suits. The issue was whether the new remedies could be applied retroactively to reach pre-enactment conduct. The petitioner (Landgraf) had sued USI Film Products for

sexual harassment, for alleged conduct which occurred prior to the enactment of the new remedies. This Court held that the new law could not be applied retroactively to conduct which occurred prior to the law's enactment, despite the pre-existence of sanctions that prohibited sexual harassment. The Court reasoned that, "[e]ven when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Id.* at 264 n.35.

Notably, the *Landgraf* Court "reached its conclusion without once referring to the defendant's conduct or the defendant's actual expectations. In fact the defendant (USI Film Products) is not even mentioned in the pertinent section of the Court's opinion." *Ponnapula*, 373 F.3d at 491 (citing *Landgraf*, 511 U.S. at 280-93). Indeed, it would have been nearly impossible for the defendant to show that it relied on the absence of a punitive damages provision. *Id.* Instead, "the Court [in *Landgraf*] made a general analysis of the impact of the amendment, finding retroactivity improper because the amendment instituted a legal change that attached a new legal burden to the proscribed conduct." *Atkinson*, 479 F.3d at 228.

The case in *Hughes Aircraft*, dealt with the issue of whether a statutory provision eliminating a particular defense to liability in suits brought under the False Claims Act (FCA) could be retroactively applied; Hughes was being sued under the FCA for allegedly making mischarges against the U.S. government. In

holding that the provision could not be retroactively applied, the Supreme Court did not consider "whether Hughes Aircraft, in particular, or any defendant, in general, in an FCA action might have relied on the former law in conducting business with the government." *Atkinson*, 479 F.3d at 229. Rather, the Court concluded that "the legal effect of the 1986 amendment would be to deprive Hughes of [a] defense," which, in the absence of express Congressional intent, required applying the Court's traditional presumption against retroactivity to that case. *Hughes*, 520 U.S. at 951-52. Thus, as in *Landgraf*, the Court's holding in *Hughes Aircraft* turned on the fact that a new legal burden was being imposed on events past, rather than on the reliance of the party affected on the former law.

Some lower courts have read *Hadix* and *St. Cyr* as imposing a reliance requirement onto the second prong of the *Landgraf* analysis; however, these interpretations are erroneous.

The case in *Hadix* concerned a provision of the Prison Litigation Reform Act (PLRA) of 1995 which placed a limit on the fees awarded to attorneys who litigate prisoner lawsuits. The Court held that the new limitation on fees would apply to work done by attorneys after the effective date of the PLRA, but not to work done before the effective date, because the new provision had a retroactive effect as to work done prior to its enactment. *Hadix*, 527 U.S. at 360. The Court reasoned that to impose the new standards for work performed before the PLRA became effective

would upset the "reasonable expectations of the parties," i.e., it would attach new legal consequences to completed conduct. *Id.* The Court reasoned that attorneys could not reasonably expect to be paid in accordance with the prior fee provision *after* the date of the enactment of the new provision and pointed out that they could discontinue future work if they so chose; in contrast, the Court reasoned, work completed *before* the new law could not be undone.

The Court in *Hadix* had before it events which occurred both before and after the enactment of the new law, and thus was faced with the task of determining at what point the new provision attached a new disability in respect to transactions already past. The Court considered reliance as a means to highlight the contrast between events prior to the enactment of the new provision and those which followed its enactment in order to make this determination. In turn, "this reliance on a set fee was the expectation which convinced the Court that a new legal burden had been imposed on past events," i.e., work completed prior to the effective date of the PLRA. *Atkinson*, 479 F.3d at 229. Thus, contrary to the Ninth Circuit Court of Appeals' interpretation set forth in *Savaria-Paguada v. Gonzales*, 488 F.3d 1122 (9th Cir. 2007), the *Hadix* Court clearly did not impose a reliance requirement in regard to retroactivity analysis.

Unlike *Hadix*, this case deals with an event which unmistakably occurred prior to the enactment of IIRIRA. Mr. Cruz-Garcia does not seek to waive a

post-IIRIRA aggravated felony conviction; rather, he seeks to waive a conviction which occurred prior to the repeal of § 212(c), an event which was completed in the past and cannot be changed.

In *Atkinson*, the Third Circuit Court of Appeals held that the repeal of § 212(c) had retroactive effect as to an alien who was convicted before the enactment of AEDPA or IIRIRA at trial of a drug trafficking offense, on the basis that the application of IRIIRA attached a new legal consequence to an event completed before the repeal, i.e., the alien's conviction. *Id.* at 229-230. The Third Circuit Court emphasized that "the important 'event' to which IIRIRA attached a new legal consequence was [Atkinson's] conviction," reasoning that, "regardless of whether the conviction resulted from trial or plea, IIRIRA's repeal of section 212(c) had the same impact – the repeal did not attach any different legal consequences to a conviction based on a bargained plea than it did to a conviction following trial." *Id.* at 230.

Similarly, in this case, IIRIRA's repeal of § 212(c) attached the same new legal consequence to Mr. Cruz-Garcia's conviction as to those convictions resulting from guilty pleas, i.e., the certainty – rather than the possibility – of facing deportation. *See St. Cyr*, 533 U.S. at 325 (citing *Hughes Aircraft*, 520 U.S. at 949 (an increased likelihood of facing a *qui tam* action constitutes an impermissible retroactive effect for the defendant)).

Contrary to the interpretations of the First, Second, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits, the *St. Cyr* Court did not impose a reliance requirement onto retroactivity analysis. Indeed, the Court in *St. Cyr* framed its analysis under the second prong of the *Landgraf* analysis by quoting Justice Story's nearly two-hundred year-old teaching that "[a] statute has retroactive effect when it 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, *or attaches a new disability*, in respect to transactions or considerations already past.'" 533 U.S. at 322 (emphasis added) (quoting *Society for Propagation of the Gospel v. Wheeler*, 2 Gall. 105, 22 F. Cas. 756, 767, F. Cas. No. 13156 (No. 13, 156) (CCNH 1814) (Story, J.)). The *St. Cyr* Court further made it clear that these parameters do not even "purport to define the outer limit of impermissible retroactivity. . . . Instead, it simply describes several '*sufficient*,' as opposed to '*necessary*,' conditions for finding retroactivity." *Id.* at 322 n.46 (quoting *Hughes*, 520 U.S. at 947) (emphasis in original). Thus, the Court in *St. Cyr* made it explicitly clear that what has so far been established are a number of *sufficient* circumstances for finding impermissible retroactivity, but not any bright-line rule.

The issue before this Court in *St. Cyr* was whether the repeal of § 212(c) would have retroactive effect as applied to persons who had been convicted as a result of pleading guilty prior to the enactment of AEDPA and IIRIRA. 533 U.S. at 326. While the Court

in *St. Cyr* did focus on the *quid pro quo* nature of a plea agreement, it did so on the basis of the facts before it, which concerned an individual who, like approximately ninety-five percent of persons in criminal proceedings, chose to plead guilty rather than go to trial. Reliance issues flow naturally from the plea bargain context, where a *quid pro quo* exists between the defendant and the government, so it is natural that the Court in *St. Cyr*, would factor the defendant's reliance on the prior state of the law in determining whether the statute had retroactive effect.

However, interpreting the *St. Cyr* decision as imposing a reliance requirement in retroactivity analysis runs contrary to this Court's holdings in *Landgraf*, *Hughes Aircraft*, and *Hadix*. *See Atkinson*, 479 F.3d at 227-231. In turn, as the Third Circuit Court of Appeals points out, "the holdings and reasoning of *Landgraf*, *Hughes Aircraft*, and *Hadix* are not somehow inapplicable to laws about deportation; the Court made plain in *St. Cyr* that the retroactive application of an immigration law is analyzed no differently from the retroactive application of any other civil statute." *Ponnapula* 373 F.3d at 491 n.7 (citing *St. Cyr*, 533 U.S. at 325 n.55).

Thus, the majority of the circuit courts have all wrongly imposed a reliance requirement onto the *Landgraf* analysis, which can only be corrected through this Court's review.

2. Alternatively, An Objectively Reasonable Reliance Interest Is Sufficient To Trigger The Presumption Against The Retroactive Application Of A Civil Statute, And Such Reliance Interest May Arise In Contexts Other Than The Point At Which An Alien Decides To Accept A Plea Bargain.

As discussed above, this Court did not impose any reliance requirement onto the second prong of the *Landgraf* retroactivity analysis. The *Landgraf* Court made it clear that the relevant underlying conduct in the retroactivity analysis is the conduct to which new legal consequences attach after such conduct has already been completed. 511 U.S. at 282. In turn, as discussed in the previous section of this petition, the most important and obvious "event" to which the passage of AEDPA and IIRIRA attached a new consequence was Petitioner's conviction itself, regardless of any specific reliance interest. *See Atkinson*, 479 F.3d at 229-230. However, if *St. Cyr* is to be read as imposing any reliance requirement, it would be only an objectively reasonable one, not an actual reliance requirement as some of the circuits have erroneously imposed by virtue of requiring the existence of a plea agreement. As the Tenth Circuit aptly notes, an actual reliance requirement effectively turns the presumption against statutory retroactivity on its head by creating a presumption *in favor* of the retroactive application of a civil statute, a result which is seriously at odds with this Court's retroactivity jurisprudence. *Hem v. Maurer*, 458 F.3d 1185, 1192

(10th Cir. 2006); *see also Ponnapula*, 373 F.3d at 491 ("It is a strange 'presumption' in our view, that arises only on so heightened a showing as actual reliance.")

As the Third Circuit Court points out, "*St. Cyr* is principally concerned with the reasonable reliance interests of aliens who enter into plea agreements as a class," not whether Enrico St. Cyr himself actually relied on the availability of § 212(c) relief in electing to plead guilty.[4] *Id.* at 492. In *Ponnapula*, the Third Circuit correctly extended this Court's holding in *St. Cyr* to the class of aliens who turned down plea offers and went to trial prior to the enactment of AEDPA and IIRIRA, holding that the same reasonable reliance that the *St. Cyr* aliens had on immigration law at the time of their pleas was also present for aliens who turned down plea agreements and proceeded to trial. *Id.* at 496. Since the Third Circuit decided *Ponnapula*, the Sixth, Ninth, and Tenth Circuits have also established that additional classes of aliens may present objectively reasonable reliance interests that

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[4] Indeed, Enrico St. Cyr accepted a guilty plea that provided for a ten-year sentence, with execution suspended after five years. *See Ponnapula v. Ashcroft*, 373 F.3d at 493 (citing Brief for the Petitioner at 11 n.7, *INS v. St. Cyr*, 533 U.S. 289 (2001)). As the *Ponnapula* Court points out, "If [St. Cyr] had actually served the full five-year unsuspended portion of his sentence, [he] would have been ineligible for discretionary relief under § 212(c) [since he was convicted after the enactment of the Immigration Act of 1990, which eliminated § 212(c) relief for aggravated felons incarcerated for five years or more]. Thus, even St. Cyr himself did not accept a plea that guaranteed his eligibility for § 212(c) relief." *Id.*

render the repeal of § 212(c) impermissibly retroactive. This is illustrated in the circuit decisions *Hernandez de Anderson v. Gonzales*, 497 F.3d 927, *Hem v. Maurer*, 458 F.3d 1185, and *Restrepo v. McElroy*, 369 F.3d 627 (2nd Cir. 2004).

Aliens who affirmatively turned down plea agreements and chose to go to trial have a reasonable reliance interest in the availability of § 212(c) that is equal to the reasonable reliance interest of persons who opted to accept a plea offer.[5] This is because, as the Ninth Circuit Court of Appeals itself has acknowledged, "That an alien charged with a crime . . . would factor the immigration consequences of conviction *in deciding whether to plead or proceed to trial* is well-documented." *Magaña-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999) (emphasis added) (quoted with approval in *St. Cyr*, 533 U.S. at 322). Indeed, this Court noted in *St. Cyr* that "There can be little doubt that, as a general matter, alien defendants considering *whether* to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *St. Cyr*, 533 U.S. at 322 (emphasis added).

Thus, it is wholly illogical to assume, as several circuits have done, that aliens rely on the availability of immigration relief *only* in opting to accept a plea offer but not in deciding to reject such an offer. On the contrary, it is simply common sense that if there is

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[5] See note 3, *supra*.

reliance on immigration advice in accepting a plea, then there must be reliance in making the converse decision, i.e., to reject, rather than accept, a plea offer. *See Ponnapula*, 373 F.3d at 495 ("There are many reasons to proceed to trial, lack of a plea agreement that would ensure eligibility for § 212(c) relief, the hope of acquittal, or the simple desire to exercise fundamental rights – but few, if any of them are inconsistent with preserving a contingent interest in § 212(c) relief.")

Moreover, in addition to the classes of persons who either accepted plea offers or affirmatively rejected them, there are additional classes of aliens who may present objectively reasonable reliance interests that render the repeal of § 212(c) impermissibly retroactive.

Several of the circuit courts have erred in determining that the only point in criminal proceedings at which the relevant underlying conduct can be found for purposes of retroactivity analysis is the decision to enter into a plea agreement and forego a jury trial. Assuming that objectively reasonable reliance is required to trigger the presumption against retroactivity, the relevant conduct for purposes of retroactivity analysis is not confined to the point at which the defendant decides whether or not to accept a plea agreement but rather can be found at any number of different points. This is illustrated in the circuit decisions at *Hernandez de Anderson v. Gonzales*, 497 F.3d 927 (9th Cir. 2007), *Hem v. Maurer*, 458 F.3d

1185 (10th Cir. 2006), and *Restrepo v. McElroy*, 369 F.3d 627 (2nd Cir. 2004).

In *Hem*, the Tenth Circuit rejected the actual reliance requirement imposed by other circuits, holding that "objectively reasonable reliance on prior law is sufficient to sustain a retroactivity claim." 458 F.3d at 1197. It further held that, "just as foregoing or exercising a right to jury trial can demonstrate objectively reasonable reliance, those who proceed to trial but forgo their right to appeal their convictions have suffered impermissible retroactive effects under IIRIRA § 304(b)." 458 F.3d at 1191.

In *Hernandez de Anderson*, the Ninth Circuit Court of Appeals followed the Tenth Circuit and also held that objectively reasonable reliance on pre-IIRIRA law is sufficient to invalidate the retroactive application of IIRIRA. 497 F.3d at 940-41 (citing *Hem* 458 F.3d at 1197). Hernandez de Anderson, a lawful permanent resident since 1973, had been convicted at trial in 1981 of attempted voluntary manslaughter, for shooting her physically abusive husband. She served four years in prison and was released in 1985. In 1995, she filed an application for naturalization, at which time she had become eligible to apply for suspension of deportation under the former 8 U.S.C. § 1254(a)(2), INA § 244(a)(2), in the event that deportation proceedings were instituted against her. However, the former Immigration and Naturalization Service (INS) did not institute proceedings against Hernandez until 2000, after the enactment of IIRIRA.

Since her conviction was an aggravated felony, she was not eligible for relief from removal under IIRIRA.

The Ninth Circuit Court held that the repeal of the suspension of deportation provision by IIRIRA was impermissibly retroactive as to Hernandez on the basis of its finding that it would have been objectively reasonable for her to rely on the availability of such relief when she filed for naturalization in 1995, as she was bringing her conviction to the attention of INS officials by filing the application. *Hernandez de Anderson*, 497 F.3d at 942-43.

In *Restrepo*, the Second Circuit Court of Appeals established yet another point at which reliance on the law at the time could reasonably develop, namely, at the point of forgoing the alien's right to affirmatively file an application for § 212(c) relief prior to being placed in deportation proceedings. 369 F.3d at 632-633. *See also* 8 C.F.R. § 212.3(b) (1992). The court in *Restrepo* reasoned that the decision to forego applying for § 212(c) relief at that time was based on the belief that he could apply if necessary in the future when, "presumably, his 212(c) case would be stronger due to a longer record of rehabilitation and community ties." *Restrepo*, 369 F.3d at 633. Thus, the court found that the elimination of § 212(c) relief to individuals who could have affirmatively chosen to apply for § 212(c), but chose not to do so in order to wait until they had stronger cases, was a violation of fundamental fairness. *Id.*

Just as the alien in *Restrepo*, Petitioner could have affirmatively applied for § 212(c) relief prior to the repeal of that statute, but it is reasonable to presume that he did not do so in reliance on his ability to accumulate greater equities over time. From the time of his conviction, up until the change in the law seventeen years later, the regulations provided him with the opportunity to affirmatively apply for an advance § 212(c) waiver. *See* 8 C.F.R. § 212.3(b) (1992) ("The application [for § 212(c) relief] may be filed *prior to*, at the time of, or at any time after the applicant's departure from or arrival into the United States.") (emphasis added). Thus, Petitioner's decision to forego affirmatively applying for § 212(c) relief implicates the same reasonable reliance concerns as those aliens who forewent their right to trial and accepted guilty pleas.

While the Court in *Restrepo* held that reliance may be established by the act of not affirmatively applying for § 212(c) relief, it did not definitively decide whether that reliance must be actual or reasonable. The circuits are severely conflicted in regard to what form of reliance is required to trigger the presumption against retroactivity, if any. Furthermore, in regard to whether there are circumstances other than those announced in *St. Cyr*, in which aliens who were convicted of deportable offenses prior to AEDPA and IIRIRA's amendments to INA § 212(c) should remain eligible to apply for § 212(c) relief, the circuits are also in conflict with one another. Indeed, as evidenced by the decisions in *Hem*, *Hernandez de*

Anderson, and *Restrepo*, the circuit courts' respective jurisprudence in this area has taken on an uneven patchwork quality, as each court attempts to resolve the questions left open by the *St. Cyr* decision. This Court's review is necessary in order to resolve these profound and irreconcilable conflicts among the circuits and ensure that Supreme Court precedent is uniformly applied.

C. The Ninth Circuit's Decision Violates Equal Protection And Creates An Irrational Result For Those Persons Who Exercised Their Right To Go To Trial In That It Affords Discretionary Relief From Removal For Persons Who Chose To Enter A Plea, While Denying Eligibility For That Relief For Similarly Situated Individuals Who Proceeded To Trial.

Petitioner's case also warrants this Court's review because the lower court's decision creates an irrational result that violates Petitioner's right to equal protection. It is well established that the Equal Protection Clause, as contained in the Fourteenth Amendment and applied to the federal government through the Due Process Clause of the Fifth Amendment, applies to aliens. *See, e.g., Yick Wo v. Hopkins*, *supra*. Under the Equal Protection Clause, the government must have a rational basis in order to treat similarly situated persons in a different manner. *See, e.g., Royster Guano Co. v. Virginia*, 253 U.S. 412, 415

(1920) (classifications of persons "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike.") In this case, there was no rational basis for the government's denial of Petitioner's application for § 212(c) relief, and the lower court erred in affirming the government's Equal Protection violation.

The Ninth Circuit's decision, as well as that of many of the other circuit courts to consider the § 212(c) eligibility issue, except for the Third Circuit, as discussed *supra*, creates an irrational distinction between two similarly situated groups of aliens. The first group of aliens is those who were convicted as a result of entering guilty pleas prior to the enactment of AEDPA/IIRIRA. The second group is those aliens who were convicted at trial prior to the enactment of AEDPA/IIRIRA.

There is absolutely no rational basis to treat these groups differently. Both groups remained eligible for § 212(c) relief after their convictions, and only later would face losing that eligibility upon the amendments to, and repeal of, § 212(c). The former INA § 212(c) was designed to afford deserving lawful resident aliens with long-term residence an opportunity to preserve their ties to this country. The procedural means by which these two groups of people were convicted bears no rational relation whatsoever to their respective deservedness of discretionary relief from removal.

It is thus irrational and violates Equal Protection to create a bright-line rule that allows only the first group to apply for § 212(c) relief, while rendering the second group *per se* ineligible to apply for the same relief. Indeed, the scheme imposed by the majority of the circuits creates an irrational result because it punishes persons who are factually innocent and proceed to attempt to establish that innocence by exercising their right to trial, while simultaneously rewarding those who do not dispute their guilt. There is no rational basis to support this disparate treatment and, therefore, it cannot be sustained. Only this Court can provide a remedy to those whose constitutional rights are being violated.

CONCLUSION

In sum, the Ninth Circuit Court of Appeals' decision in this case is not consistent with the framework established by this Court for determining whether a civil statute has retroactive effect in regard to conduct completed before its enactment. Furthermore, there is an irreconcilable split among the circuits on this matter of profound importance. Finally, the lower court's decision violates the Equal Protection Clause of the Constitution. For all of the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

JAN JOSEPH BEJAR
Counsel for Petitioner
Gabriel Cruz-Garcia

January 2, 2009

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GABRIEL CRUZ-GARCIA, Petitioner, v. MICHAEL B. MUKASEY, Attorney General, Respondent.	No. 06-74109 Agency No. A34-632-697 MEMORANDUM* (Filed Jul. 11, 2008)

On Petition for Review of an Order of the Board of Immigration Appeals

Submitted July 1, 2008**

Before: WALLACE, HAWKINS, and THOMAS, Circuit Judges.

Gabriel Cruz-Garcia, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' order dismissing his appeal from an immigration judge's removal order. We have jurisdiction pursuant to 8 U.S.C. § 1252. We review de novo questions of law, *Fernandez-Ruiz v. Gonzales*, 468

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

F.3d 1159, 1163 (9th Cir. 2006), and we deny the petition for review.

Cruz-Garcia's contention that he is eligible for relief under former § 212(c) is foreclosed by *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121-22 (9th Cir. 2002) (aliens who "pleaded not guilty and elected a jury trial . . . [are] barred from seeking § 212(c) relief"). *See also Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1131-34 (9th Cir. 2007). Under *Armendariz-Montoya*'s reasoning, Cruz-Garcia is not similarly situated, for purposes of § 212(c) relief, to those aliens who pled guilty. He has therefore not established an equal protection violation. *See Dillingham v. INS*, 267 F.3d 996, 1007 (9th Cir. 2001) ("In order to succeed on his [equal protection] challenge, the petitioner must establish that his treatment differed from that of similarly situated persons.").

PETITION FOR REVIEW DENIED.

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A34-632-697 – San Diego Date: AUG-4 2006

In re: CRUZ-GARCIA, GABRIEL

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Bejar, Jan Joseph, Esquire

ON BEHALF OF DHS:
Janet L. Murray, Assistant Chief Counsel

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge. See Matter of Burbano, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). As the respondent's conviction after a jury trial clearly disqualifies him from section 212(c) benefits under the regulations, he cannot benefit from the waiver. 8 C.F.R. § 1212.3(h); see Armendariz-Montoya v. Sonchik, 291 F.3d 1116, 1121 (9th Cir. 2002) (holding that the reasoning in INS v. St. Cyr, 533 U.S. 289 (9th Cir. 1999), does not apply to

an alien convicted after a jury trial); see also Kelava v. Gonzales, 434 F.3d 1120, 1124-25 (9th Cir. 2006). Accordingly, the appeal is dismissed.

/s/ Jeffery L. Romig
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Diego, California

File A 34 632 697 August 1, 2005

In the Matter of

GABRIEL CRUZ-GARCIA,	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGE: Section 237(a)(2)(B)(i) of the Immigration and Nationality Act ("hereinafter the Act"), alien, who any time after admission, has been convicted of a law related to a controlled substance.

APPLICATIONS: Section 212(c) waiver under the Immigration and Nationality Act, as it assisted before the amendments of 1996 and pursuant to the decision by the Supreme Court in the case of *INS v. St. Cyr*, 533 U.S. 289 (2001).

ON BEHALF OF RESPONDENT:	ON BEHALF OF DEPARTMENT OF HOMELAND SECURITY:
Attorney	Government Counsel
Jan Joseph Bejar	Janet Murray

ORAL OPINION AND ORDER OF THE IMMIGRATION JUDGE

The respondent is charged as a native and citizen of Mexico, who is also a legal permanent resident of the United States and who was convicted on October 26, 1979 in the U.S. District Court for the Southern District California for the offense of distribution of cocaine, violation of Title 21 of the United States Code, Section 841(a)(1). The conviction documents are in the record.

There appears to be no factual dispute[s /s/ IF] with the essential facts in this case, that is[, /s/ IF] that the respondent is a native and citizen of Mexico, a legal permanent resident and also that he was convicted of the offense in question. The sole issue in the case is a legal one, and[, /s/ IF] that is[, /s/ IF] whether the respondent is eligible to apply for the only relief that he appears to be eligible for, which is a Section 212(c) waiver pursuant to the provisions of the case *INS v. St. Cyr*.

According to the conviction records, which have not been opposed by the respondent, it appears that the respondent was convicted pursuant to a jury verdict of guilt and not by a plea agreement. The respondent argues that even though the *St. Cyr* decision was based on a plea of guilt conviction and not a conviction after a trial by jury, that the provisions of *St. Cyr* with respect to its consideration of the retroactive effect of the [~~appeal~~ repeal /s/ IF] of

Section 212[~~(ii), that it~~ (c) /s/ IF] should also apply to him. The Government opposes.

The Court disagrees with the respondent's position. The essence of the *INS v. St. Cyr* decision is the effect of retroactivity on the settled expectations that were reasonable for alien defendants to have when they entered in [~~complete~~ plea /s/ IF] negotiations with prosecuting attorneys. The principles of reasonable expectations in *St. Cyr* clearly do not apply to someone who did not plead guilty, but rather was tried by a jury. The Ninth Circuit Court of Appeals has already ruled on this matter and found that *St. Cyr* does not apply to individuals convicted by a jury trial. *See Armandariz v. Sonchik*, 291 F.3d 116 (9th Cir. 2002), *cert. denied*, 539 US. 902 (2003). The regulations adopted by the Attorney General [~~also~~ /s/ IF] to implement the *St. Cyr* decision also clearly indicate that these do not apply to individuals who were convicted after a trial by jury. Therefore, the respondent is not eligible for a Section 212(c) waiver and there is no other relief that he appears to be eligible for, therefore, the Court issues the following order.

The respondent is found to be removable as charged.

The respondent's Section 212(c) application is pretermitted and denied on that basis.

The respondent is hereby ordered removed to Mexico based on the charge in the charging document.

/s/ Ignacio P. Fernandez-Valdes*
IGNACIO P. FERNANDEZ-VALDES
Immigration Judge

[* Transcript of the oral decision was removed, corrected and signed without the R.O.P. in San Diego, CA on January 27, 2006 /s/ IF]

CERTIFICATE PAGE

I hereby certify that the attached proceeding before IGNACIO P. FERNANDEZ-VALDES, in the matter of:

GABRIEL CRUZ-GARCIA

A 34 632 697

San Diego, California

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Deborah Hoose
(Deborah R. Hoose, Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

January 15, 2006
(Completion Date)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GABRIEL CRUZ-GARCIA, Petitioner, v. MICHAEL B. MUKASEY, Attorney General, Respondent.	No. 06-74109 Agency No. A034-632-697 ORDER (Filed Nov. 20, 2008)

Before: WALLACE, HAWKINS, and THOMAS, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

No. 08-878

In the Supreme Court of the United States

GABRIEL CRUZ-GARCIA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELENA KAGAN
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QUESTIONS PRESENTED

In 1996, Congress repealed Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), which provided for a discretionary waiver of deportation, and replaced it with another form of discretionary relief not available to aliens convicted of certain crimes, including aggravated felonies and controlled-substance offenses. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that the repeal of Section 212(c) did not apply retroactively to an alien previously convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief. The questions presented are:

1. Whether this Court's holding in *St. Cyr* applies to an alien who was convicted of a controlled-substance offense after trial, and who therefore did not relinquish his right to a trial in reliance on potential eligibility for a waiver under Section 212(c).

2. Whether, for purposes of the retroactive availability of relief under former Section 212(c), it violates the equal protection component of the Due Process Clause to distinguish between an alien who is removable on the basis of a conviction that followed a guilty plea and one whose conviction occurred after a jury trial.

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In the Supreme Court of the United States

No. 08-878

GABRIEL CRUZ-GARCIA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-2) is not published in the *Federal Reporter* but is reprinted in 285 Fed. Appx. 446. The orders of the Board of Immigration Appeals (Pet. App. 3-4) and the immigration judge (Pet. App. 5-8) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2008. A petition for rehearing was denied on November 20, 2008 (Pet. App. 9). The petition for a writ of certiorari was filed on January 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. 1182(c) (1988)

(repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. While, by its terms, Section 212(c) applied only to exclusion proceedings, it was generally construed as being applicable in both deportation and exclusion proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In 1996, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress amended Section 212(c) to make ineligible for discretionary relief aliens previously convicted of certain criminal offenses, including controlled-substance offenses. See *St. Cyr*, 533 U.S. at 297 n.7. Later that year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which now provides for a form of discretionary relief known as cancellation of removal that is not available to many criminal aliens, including those who have been convicted of an aggravated felony (which, as relevant to this case, includes a drug-trafficking crime). See 8 U.S.C. 1101(a)(43)(B), 1229b(a)(3); see also *St. Cyr*, 533 U.S. at 297.

In *St. Cyr*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326. In particular, the Court in *St. Cyr* explained that, before 1996, aliens who decided "to forgo their right to a trial" by pleading guilty to an aggravated fel-

ony "almost certainly relied" on the chance tnat, notwithstanding their convictions, they would still have some "likelihood of receiving § 212(c) relief" from deportation. *Id.* at 325.

On September 28, 2004, after notice-and-comment rulemaking proceedings, the Department of Justice promulgated regulations to take account of the *St. Cyr* decision. See *Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004). In its response to comments received on its proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for [S]ection 212(c) relief under *St. Cyr*," and then stated that it "has determined to retain the distinction between ineligible aliens who were convicted after criminal trials[] and those convicted through plea agreements." *Id.* at 57,828. That determination is reflected in the regulations, which make aliens ineligible to apply for relief under former Section 212(c) "with respect to convictions entered after trial." 8 C.F.R. 1212.3(h).

2. Petitioner is a native of Mexico who was admitted to the United States for lawful permanent residence in 1976. Pet. App. 6; Admin. R. 78, 117 (A.R.). On October 26, 1979, after a trial at which petitioner pleaded not guilty, a jury in the United States District Court for the Southern District of California found petitioner guilty of three counts of unlawful distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). Pet. App. 6; A.R. 96, 117. Petitioner was sentenced to a fifteen-year term of imprisonment; all but 179 days of the sentence was suspended, and he was placed on probation for five years. A.R. 96.

On January 25, 2005, the Department of Homeland Security commenced immigration proceedings against

petitioner, charging him with being removable in light of his conviction for distribution of a controlled substance. A.R. 117-118; see 8 U.S.C. 1227(a)(2)(B)(i). Petitioner sought a waiver of removal under former Section 212(c). Pet. App. 6. On August 1, 2005, after a hearing, the immigration judge pretermitted petitioner's application for a waiver because, unlike the alien in *St. Cyr*, petitioner had gone to trial on his drug offense rather than pleading guilty. *Id.* at 6-7 (discussing *St. Cyr*, *supra*; *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121-1122 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); and "[t]he regulations adopted by the Attorney General * * * to implement the *St. Cyr* decision").

On August 4, 2006, the Board of Immigration Appeals (BIA) affirmed the immigration judge's decision and dismissed petitioner's appeal concerning his eligibility for relief from removal. Pet. App. 3-4 (citing *St. Cyr*, *supra*; *Armendariz-Montoya*, *supra*; and *Kelava* v. *Gonzales*, 434 F.3d 1120, 1124-1125 (9th Cir.), cert. denied, 549 U.S. 810 (2006)).

3. The court of appeals denied petitioner's petition for review of the BIA's decision in a brief, unpublished, per curiam opinion dated July 11, 2008. Pet. App. 1-2. The court held that petitioner's arguments were foreclosed by *Armendariz-Montoya*, *supra*, which had concluded that aliens who "pleaded not guilty and elected a jury trial . . . [are] barred from seeking § 212(c) relief." Pet. App. 2 (quoting *Armendariz-Montoya*, 291 F.3d at 1122). The court further rejected petitioner's argument that it violates equal protection to make such a distinction for purposes of the retroactive availability of relief under Section 212(c) between aliens whose convictions came after trial and those whose convictions came after a guilty plea. *Ibid.* On November 20, 2008,

the court of appeals denied petitioner's request for rehearing en banc. *Id.* at 9.

ARGUMENT

1. Petitioner's first asserted ground for certiorari (Pet. 14-17) is that the Ninth Circuit created a circuit split and called a federal regulation into question by deciding that relief under former Section 212(c) does not have to be made available to aliens in deportation (as opposed to exclusion) proceedings. But the court of appeals did not make any such ruling in petitioner's case. That issue was neither pressed nor passed upon in the court below, and it is unrelated to the retroactivity question that actually was decided by the court of appeals in this case. That alone is sufficient reason to deny petitioner's request that the Court consider that distinct issue. See, *e.g.*, *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001); *Glover* v. *United States*, 531 U.S. 198, 205 (2001).

Moreover, the decision petitioner complains about on this score—*Abebe* v. *Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc)—is still pending before the Ninth Circuit on a petition for rehearing. See *id.* at 1204 (noting that "[t]he petition for rehearing remains pending" and inviting a response from the government). The government filed a response (opposing further rehearing) on February 25, 2009. Accordingly, any consideration bythis Court of the separate issue decided in *Abebe* would be especially premature.[1]

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[1] Petitioner contends that the decision in *Abebe* "calls into question the constitutionality of a federal regulation." Pet. 14 (capitalization modified); see also Pet. 6. After the petition for a writ of certiorari in this case was filed, however, the Ninth Circuit issued a revised opinion

2. Petitioner next contends (Pet. 17-26) that *INS* v. *St. Cyr*, 533 U.S. 289 (2001), which involved aliens convicted of an aggravated felony after a plea agreement, has been misinterpreted by the majority of the courts of appeals and that the retroactive availability of Section 212(c) relief should be extended to aliens who were found guilty of a deportable offense after a jury trial, because retroactivity analysis should not include a reliance requirement. In the alternative, he contends (Pet. 27-34) that any reliance requirement would be satisfied by objectively reasonable reliance, which could be shown by conduct other than a guilty plea. The unpublished decision of the court of appeals does not warrant further review, because petitioner's arguments lack merit. The courts of appeals have correctly recognized that reliance is a significant factor to be considered for purposes of retroactivity analysis, although it may be given different weight in different circuits and there is variation about whether it must be actual or objectively reasonable reliance. Furthermore, the underlying question involves the retroactive effect of a statutory repeal that occurred more than 12 years ago, and this Court has denied petitions urging a similar extension of *St. Cyr* in a number of prior cases. See, *e.g.*, *Aguilar* v. *Mukasey*, 128 S. Ct. 2961 (2008); *Zamora* v. *Mukasey*, 128 S. Ct. 2051 (2008); *Hernandez-Castillo* v. *Gonzales*, 549 U.S. 810 (2006); *Thom* v. *Gonzales*, 546 U.S. 828 (2005); *Stephens* v. *Ashcroft*, 543 U.S. 1124 (2005); *Reyes* v. *McElroy*, 543 U.S. 1057 (2005); *Armendariz-Montoya* v. *Sonchik*, 539 U.S. 902 (2003).

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in *Abebe*, which specifically stated that it did not "cast[] any doubt on the regulation" to which petitioner refers. 554 F.3d at 1207.

a. Petitioner's argument (Pet. 17-26) that the decision below conflicts with this Court's retroactivity analysis by considering whether petitioner relied on Section 212(c) before it was repealed lacks merit. As this Court has explained, in determining whether a statute has a retroactive effect, a court must make a "commonsense, functional judgment" that "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin* v. *Hadix*, 527 U.S. 343, 357-358 (1999) (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)).

In *St. Cyr* itself, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." 533 U.S. at 321-322 (citation and internal quotation marks omitted). In light of "the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because, in the Court's view, aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving § 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325.

In asserting that the court of appeals misinterpreted *St. Cyr*, petitioner principally relies (Pet. 17-26) on three of this Court's retroactivity cases: *Landgraf*, *supra*; *Hughes Aircraft Co.* v. *United States ex rel. Schumer*,

520 U.S. 939 (1997); and *Martin*, *supra*. Not only did *Landgraf* and *Martin* both specifically mention "reasonable reliance," *Martin*, 527 U.S. at 358; *Landgraf*, 511 U.S. at 270, but all three of petitioner's cases predated this Court's decision in *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), which explicitly discussed *St. Cyr* and confirmed the importance of reliance in its analysis. In *Fernandez-Vargas*, the Court stated that *St. Cyr* "emphasized that plea agreements involve a *quid pro quo* * * * in which a waiver of constitutional rights * * * had been exchanged for a perceived benefit * * * valued in light of the possible discretionary relief, a focus of expectation and reliance." *Id.* at 43-44 (internal quotation marks omitted). Distinguishing the situation of the alien in *Fernandez-Vargas* from that of the alien in *St. Cyr*, the Court remarked that, "before IIRIRA's effective date Fernandez-Vargas never availed himself of [provisions providing for discretionary relief] or took action that enhanced their significance to him in particular, as St. Cyr did in making his *quid pro quo* agreement." *Id.* at 44 n.10.

Thus, the court of appeals did not err in considering reasonable reliance as part of its "commonsense, functional" judgment about retroactivity. *Martin*, 527 U.S. at 357.

b. Petitioner contends (Pet. 5-6) that there is a conflict among the circuits as to the availability of Section 212(c) relief to aliens convicted of crimes prior to the enactment of AEDPA and IIRIRA. The disagreement is quite narrow, however. Nine circuits have declined to extend the holding of *St. Cyr* generally to aliens convicted after going to trial rather than pleading guilty. See *Dias* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Rankine* v. *Reno*, 319 F.3d

93, 102 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (4th Cir. 2007); *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 520 (5th Cir.), cert. denied, 549 U.S. 810 (2006); *United States* v. *Zuñiga-Guerrero*, 460 F.3d 733, 737-739 (6th Cir. 2006), cert. denied, 549 U.S. 1145 (2007); *United States* v. *De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008); *Hernandez de Anderson* v. *Gonzales*, 497 F.3d 927, 940 (9th Cir. 2007); *Hem* v. *Maurer*, 458 F.3d 1185, 1189 (10th Cir. 2006); *Ferguson* v. *United States Att'y Gen.*, No. 08-10806, 2009 WL 824434 (11th Cir. Mar. 31, 2009).[2] Only the Third Circuit has held that no showing of reliance is required and that new legal consequences attached by IIRIRA to an alien's conviction were sufficient to prevent the BIA from precluding Section 212(c) relief. See *Atkinson* v. *Attorney Gen.*, 479 F.3d 222, 231 (2007).[3] Retreating from dictum in

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[2] Petitioner cites (Pet. 5) *Thaqi* v. *Jenifer*, 377 F.3d 500 (6th Cir. 2004), but that court's discussion of reliance (*id.* at 504 n.2) was dictum in light of its holding that applying AEDPA retroactively to the alien there would be impermissibly retroactive in light of his guilty plea (*id.* at 503-504). Petitioner also cites (Pet. 5) *Brooks* v. *Ashcroft*, 283 F.3d 1268 (11th Cir. 2002), but the court there found that it had no jurisdiction to address the alien's argument about statutory retroactivity. *Id.* at 1274 n.6.

[3] Petitioner cites (Pet. 5) the Fourth Circuit's decision in *Olatunji* v. *Ashcroft*, 387 F.3d 383 (2004), as rejecting a reliance requirement for retroactivity analysis. The retroactivity issue in *Olatunji*, however, involved the loss of an alien's ability to take brief trips abroad without subjecting himself to removal proceedings, *id.* at 395-396, rather than the loss of access to Section 212(c) relief. *Olatunji* itself distinguished the Fourth Circuit's prior decision in *Chambers* v. *Reno*, 307 F.3d 284 (2002), which involved Section 212(c). See *Olatunji*, 387 F.3d at 392 (discussing *Chambers*, 307 F.3d at 293). Even after *Olatunji*, the Fourth Circuit has—directly contrary to petitioner's argument—continued to hold that "IIRIRA's repeal of § 212(c) did not produce an im-

Ponnapula v. *Ashcroft*, 373 F.3d 480 (3d Cir. 2004), which had suggested that an alien who had not been offered a guilty plea would be unable to establish reliance for purposes of retroactivity analysis, *id.* at 494, the court in *Atkinson* expressly addressed "the situation of aliens who, like Atkinson, had not been offered pleas and who had been convicted of aggravated felonies following a jury trial at a time when that conviction would not have rendered them ineligible for [S]ection 212(c) relief."[4] 479 F.3d at 229-230.

Petitioner does not, however, mention the *Atkinson* court's acknowledgment that Atkinson might be precluded from relief under Section 212(c) because he had not acquired seven years of unrelinquished, lawful permanent residence in the United States when he committed an aggravated felony. See 479 F.3d at 230 n.7. Petitioner himself would fail under such a standard because, unlike the alien in *St. Cyr*, he had been a lawful permanent resident for only three years at the time of his conviction, A.R. 78, 117—far less than the seven-year minimum required for eligibility under Section 212(c). Cf. *Jurado-Delgado* v. *Attorney Gen. of the United States*, No. 06-4495, 2009 WL 90850, at *10 (3d Cir. Jan. 15, 2009) (Sloviter, J., concurring) (concluding that an alien's "right to § 212(c) relief had not vested" because he "had not established seven years of continuous presence at the time of his commission of the offenses leading to" the convictions that rendered him ineligible for cancellation of removal). Accordingly, even if the issue

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permissibly retroactive effect as applied to an alien convicted after trial." *Mbea*, 482 F.3d at 281.

[4] Petitioner here concedes (Pet. 11 n.3) that the record does not indicate "whether [he] was offered a plea agreement."

here otherwise warranted review, which it does not, this case would not be a suitable vehicle for its consideration.

c. Petitioner's alternative argument (Pet. 28-34)—that he could establish objectively reasonable reliance in accordance with decisions from the Second, Ninth, and Tenth Circuits—is unpersuasive. His circumstances are different from those of the alien in the Tenth Circuit's decision in *Hem*, because Hem made an objectively reasonable decision to forgo a right to an appeal that would have put him "at risk of being sentenced to a sentence longer than 5 years * * * making him ineligible for § 212(c) relief."[5] 458 F.3d at 1199. For similar reasons, petitioner's case is also materially different from that of the alien in the Ninth Circuit's decision in *Hernandez de Anderson*, who had taken the affirmative step of bringing "herself—and her criminal conviction—to the INS's attention by applying for naturalization," and who had, in doing so, relied upon the potential availability of suspension of deportation by waiting to apply for naturalization until she had accrued the ten years of continuous residence that made her eligible for such relief. 497 F.3d at 936-937, 941-943. Petitioner points to no affirmative act he committed in reliance on the availability of Section 212(c) before its repeal.[6]

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[5] Petitioner would not have been exposed to any such risk at the time he would have made any decision about appealing his 1979 conviction, because the five-year-imprisonment ceiling was not added to Section 212(c) until 1990. See Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052.

[6] Of course, to the extent that petitioner relies upon disagreement between the Ninth Circuit's decision in this case and its earlier decision in *Hernandez de Anderson*, this Court does not sit to resolve intra-circuit disputes. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Presumably for that reason, petitioner stresses (Pet. 32-33) the Second Circuit's decision in *Restrepo*, which remanded an alien's habeas petition to the district court to allow him to attempt to show that he had made a "choice to forgo filing an affirmative application [for Section 212(c) relief] in the hope of building a stronger record and filing at a later date." *Restrepo* v. *McElroy*, 369 F.3d 627, 637, 638-639 (2004).[7] Although petitioner correctly notes that *Restrepo* did not "definitively decide whether that [form of] reliance must be actual or reasonable," Pet. 33, he omits to mention that the Second Circuit has since held that any alien seeking to benefit from the argument that he "delayed filing an affirmative § 212(c) application to build a stronger case * * * must make *an individualized showing* of reliance." *Wilson* v. *Gonzales*, 471 F.3d 111, 122 (2d Cir. 2006) (emphasis added); see also *Carranza-de Salinas* v. *Gonzales*, 477 F.3d 200, 210 (5th Cir. 2007) (following *Wilson* and remanding to the BIA to allow an alien to "demonstrate * * * that she affirmatively decided to postpone her § 212(c) application to increase her likelihood of relief"). Petitioner does not cite any case that found such a showing had been made, and he does not even attempt to make any individualized showing. To the contrary, he merely suggests (Pet. 33) that "it is reasonable to presume" that he failed to apply for Section 212(c) relief before IIRIRA was enacted because he was attempting "to accumulate greater equities over time."

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[7] On remand in *Restrepo*, the district court denied the alien's habeas petition without addressing whether he had made (or objectively could have made) a considered choice to wait to file a Section 212(c) application, because he was statutorily ineligible for Section 212(c) relief on other grounds. See *Restrepo* v. *McElroy*, 354 F. Supp. 2d 254, 259 (E.D.N.Y. 2005).

Even assuming that reliance in the form of purposeful waiting could be shown on the basis of an objective rather than a subjective standard, the 17-year period between petitioner's conviction and the repeal of Section 212(c) is much longer than the comparable periods in cases that contemplated the possibility of a viable claim of reliance. See *Carranza-de Salinas*, 477 F.3d at 202 (less than 38 months between conviction and IIRIRA's enactment); *Wilson*, 471 F.3d at 113 (less than 42 months between last conviction and IIRIRA's enactment); *Restrepo*, 354 F. Supp. 2d at 255 (less than 51 months between sentencing and AEDPA's enactment). Indeed, given petitioner's failure to act during those 17 years—or even during the additional six months between IIRIRA's enactment and the effective date of its repeal of Section 212(c), see IIRIRA § 309(a), 110 Stat. 3009-625—it is most reasonable to conclude that petitioner had no intention whatsoever of applying for Section 212(c) relief, but was instead simply hoping that the government would not try to remove him on account of his conviction on three counts of drug trafficking.

3. Petitioner also contends (Pet. 34-36) that the court of appeals' decision violates the equal protection component of the Due Process Clause because it "creates an irrational distinction" between two groups of aliens he claims are "similarly situated": those who were convicted before AEDPA and IIRIRA as a result of pleading guilty, and those who were convicted before AEDPA and IIRIRA as a result of a trial. Pet. 35.

Petitioner does not suggest that there is any disagreement among the courts of appeals on that question. In fact, one case he cites (Pet. 5) for a different proposition expressly rejected an equal protection claim about IIRIRA's retroactive repeal of Section 212(c) on the

ground that there is "a rational basis in differentiating between a defendant who pleads guilty versus a defendant who goes to trial." *Brooks* v. *Ashcroft*, 283 F.3d 1268, 1274 (11th Cir. 2002).

Moreover, the court of appeals correctly rejected petitioner's equal protection argument, because he was not similarly situated with aliens the court found to be eligible for Section 212(c) relief. See *Caban* v. *Mohammed*, 441 U.S. 380, 398 (1979); *Dillingham* v. *INS*, 267 F.3d 996, 1007 (9th Cir. 2001). Petitioner is not similarly situated *vis-à-vis* an alien in deportation proceedings commenced before AEDPA and IIRIRA, because that person applied for a waiver before Section 212(c) was repealed by IIRIRA, and before AEDPA's limitations on discretionary relief were effective. Nor is he similarly situated *vis-à-vis* an alien in later-initiated removal proceedings who surrendered an important legal right by pleading guilty in presumptive reliance upon existing eligibility under the law at the time. As this Court has previously recognized, the "protection of reasonable reliance interests" is sufficient to survive equal protection review even under the heightened scrutiny used for equal protection challenges to gender-based classifications. *Heckler* v. *Mathews*, 465 U.S. 728, 746 (1984). It follows *a fortiori* that reliance can provide the basis for a legitimate distinction in the immigration context.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

GABRIEL CRUZ-GARCIA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
Attorney General,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY BRIEF FOR PETITIONER

This Court should grant Petitioner's petition for writ of certiorari to correct the misapplication of this Court's retroactivity analysis by the Ninth Circuit Court of Appeals, as well as by other circuit courts, and also to resolve the conflict among the circuits in regard to the issue of whether lawful permanent residents who are removable on the basis of a conviction by jury trial, and who remained, even after the conviction, statutorily eligible for relief from removal under the then-existing 8 U.S.C. § 1182(c) (known as "§ 212(c)") relief, and who now face removal proceedings initiated after the repeal of the statute, continue to remain eligible for that relief. Respondent has failed to rebut Petitioner's arguments that he remains eligible for § 212(c) relief and that no showing of reliance or *quid pro quo* agreement is required in order to show retroactive effect under this Court's well-established retroactivity analysis.

1. Respondent's assertion that the issues raised in Petitioner's petition do not warrant this Court's review is without merit. Respondent argues that this Court should deny Petitioner's request to consider whether or not persons rendered removable on the basis of pre-AEDPA (Anti-terrorism and Effective Death Penalty Act), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996), and pre-IIRIRA (Illegal Immigration Reform and Immigrant Responsibility Act), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), convictions remain eligible for relief from

removal under § 212(c), on the basis that (1) the lower court did not decide that issue in this case and (2) a petition for re-hearing en banc filed by the petitioner in *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc) is pending before the Ninth Circuit Court of Appeals. Res. Opp. at 5.

These contentions are without merit. First, this Court has jurisdiction to consider an issue that was not presented below. *See Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). Though the Court does not ordinarily do so, "the rule is not inflexible" and the Court will review questions not pressed or passed upon below in exceptional cases. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Petitioner presents an exceptional case. The *Abebe* decision was issued on November 20, 2008, subsequent to the issuance of the lower court's Memorandum decision denying Petitioner's petition for review, and the same date on which the lower court denied his petition for rehearing en banc. Therefore, Petitioner simply did not have any opportunity to challenge *Abebe* before the court below. Yet, the lower Court's holding in *Abebe* is dispositive in Petitioner's case because he is seeking relief from removal under § 212(c). Thus, even if this Court granted Petitioner's petition and decided the retroactivity issue in his favor, he would nonetheless remain ineligible for § 212(c) relief if the *Abebe* decision is allowed to stand. The same would be true for all other similarly situated individuals seeking relief from removal who reside within the

jurisdiction of the Ninth Circuit Court of Appeals. Thus, this Court's review is warranted.

Second, this Court clearly has jurisdiction to grant the writ of certiorari notwithstanding the fact that *Abebe* is still pending before the Ninth Circuit on petition for rehearing. Furthermore, the legal questions raised by *Abebe*, which have given rise to a circuit split and represent an extraordinary departure from over 60 years of agency and judicial precedent, are of extreme importance and are ripe for review by this Court. Thus, the Respondent's argument that this Court's review of the issues raised by *Abebe* would be "especially premature" is unavailing. Res. Opp. at 5.

2. The Respondent's arguments that the Ninth Circuit Court of Appeals and other circuit courts have correctly imposed a reliance requirement onto the retroactivity analysis established by this Court are unconvincing.[1] As discussed in detail in the petition (Cert. Pet. at 17-26), this Court has never held that reliance on prior law is required to determine whether a statute may be applied retroactively. Cert. Pet. at 17-26. As discussed in the petition, this Court

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[1] Respondent attempts to diminish Petitioner's arguments regarding the retroactive effect of the statutory repeal of § 212(c) by noting the fact that the repeal occurred 12 years ago. Res. Opp. at 6. However, the issues before this Court continue to impact thousands of individuals (Cert. Pet. at 6-7) and therefore merit review.

did not impose a reliance requirement in *INS v. St. Cyr*, 533 U.S. 289 (2001). Cert. Pet. at 25.

Furthermore, the Respondent's arguments that this Court "confirmed the importance of reliance" in retroactivity analysis in *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006) are without basis, as it is clear that the Respondent has misconstrued the Court's holding in that case. Indeed, the Court's reasoning in *Fernandez-Vargas* supports rather than detracts from Petitioner's position that a statute has retroactive effect simply if it attaches new consequences or liabilities to a past act or event which cannot be undone, irrespective of any affirmative reliance on prior law. Cert. Pet. at 24.

In support of its contention that the Court in *St. Cyr* imposed a reliance or *quid pro quo* requirement, the Respondent refers to dictum in *Fernandez-Vargas*, in which the Court simply states the fact that the *St. Cyr* Court emphasized the *quid pro quo* nature of the plea bargain in determining whether the repeal of § 212(c) had a retroactive effect as applied to an individual who had pled guilty to an offense rendering him removable. Res. Opp. at 7-8 (*citing Fernandez-Vargas*, 548 U.S. at 43-44). This reference does not support the Respondent's position, however, because the holding in *Fernandez-Vargas* did not turn on the issue of whether or not the petitioner had taken an affirmative step to avail himself of discretionary relief, or otherwise enhance the significance of such relief to himself in particular, prior to the effective date of the reinstatement provisions. *See*

Fernandez-Vargas, 548 U.S. at 44; *see also id.* at n.10. Rather, the Court in *Fernandez-Vargas* recognized that a statute has retroactive effect if it attaches new consequences to past acts and held that the reinstatement provisions did not have retroactive effect as applied to *Fernandez-Vargas* because the new law does not penalize the actual act of reentry, but rather creates a removal process to be initiated at *any time* after reentry, and thus it is "the alien's choice to continue his illegal presence, after illegal reentry and after the effective date of the new law, that subjects him to the new and less generous regime, not a past act that he is helpless to undo . . . " *Id.*

As such, contrary to the Respondent's assertion, the Court in *Fernandez-Vargas* did not "confirm the importance of reliance" in retroactivity analysis by making reference to the *quid pro quo* agreement in *St. Cyr*, but rather used that agreement as an example of a single past act to which new legal consequences subsequently attached, as opposed to Fernandez-Vargas' ongoing choice to remain in the country, both before and after the passage of the new law. *Id.* This holding is consistent with the holdings in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *Martin v. Hadix*, 527 U.S. 343, 360 (1999); and *Hughes Aircraft Company v. U.S. ex rel. Schumer*, 520 U.S. 939, 951-952 (1997), where this Court held in each case, respectively, that the presumption against retroactivity was applicable because a new legal burden was being imposed on

past conduct or events which could not be undone. Similarly, in this case, the past act or event to which IIRIRA has attached a new legal consequence is Petitioner's conviction; the repeal of § 212(c) "did not attach any different legal consequences to a conviction based on a bargained plea that it did to a conviction following trial." *See Atkinson v. Attorney Gen. of the United States*, 479 F.3d 222 (3rd Cir. 2007). Thus, this Court's reasoning in *Fernandez-Vargas* supports a finding that the repeal of § 212(c) has a retroactive effect as applied to Petitioner.

In addition to misreading *Fernandez-Vargas*, the Respondent also mischaracterizes the split among the circuits regarding the issue of whether persons convicted at trial remain eligible for § 212(c) relief. Respondent characterizes the split as being "quite narrow," noting that nine of the circuits "have declined to extend the holding of *St. Cyr* generally to aliens convicted after going to trial rather than pleading guilty." Res. Opp. at 8. However, the Respondent itself recognizes that there are numerous inconsistencies among the circuits regarding the issue of whether reliance is "a significant factor to be considered for purposes of retroactivity analysis" and acknowledges that reliance "may be given different weight in different circuits and there is variation about whether it must be actual or objectively reasonable reliance." Res. Opp. at 6. What Respondent fails to acknowledge is that the circuit split regarding the issue of reliance in retroactivity analysis has caused some circuits to hold that § 212(c) relief remains

available to aliens who were convicted by jury at trial prior to the law's repeal, while others have reached the opposite result. *See Hem v. Maurer*, 458 F.3d 1185, 1200 (10th Cir. 2006). Thus, contrary to Respondent's argument, there exists a pronounced split among the circuits regarding the issue of whether persons who are removable on the basis of a conviction by jury trial, and who remained, even after the conviction, statutorily eligible for relief from removal under the then-existing 8 U.S.C. § 1182(c) relief, and who now face removal proceedings initiated after the repeal of the statute, continue to remain eligible for that relief.

The inconsistencies among the circuits on this issue are in turn rooted in the respective courts' erroneous imposition of a reliance requirement. Because the imposition of a reliance requirement effectively shoulders the applicant with the burden of proving that a statute has a retroactive effect as applied to him, it is by definition antithetical to the *presumption*[2] *against* statutory retroactivity established by this Court and consequently has led to much confusion, judicial inefficiency, and arbitrary results among the circuits.

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[2] As defined in Black's Law Dictionary, "A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption." *Black's Law Dictionary* 549 (2nd Pocket Ed. 2001).

Respondent's discussion in section 2c of its opposition highlights this fact. For example, the Respondent points to the case in *Hem*, where the Tenth Circuit Court of Appeals held that Hem, who was convicted at trial, was eligible for § 212(c) relief because he made an objectively reasonable decision to forgo a right to appeal that would have put him "at risk of being sentenced to a sentence longer than 5 years . . . making him ineligible for § 212(c) relief." *Hem*, 458 F.3d at 1199. Respondent argues that Petitioner's case is distinguishable because in 1979 Petitioner would not have been exposed to such risk because the five-year-imprisonment ceiling was not added to § 212(c) until 1990, and thus, Respondent argues, Petitioner cannot demonstrate "reasonable reliance." Res. Opp. at 11 n.5. Assuming arguendo that Respondent's argument is valid, this juxtaposition only serves to expose the "reliance requirement" as artificial and irrelevant as to the question whether the repeal of § 212(c) has a retroactive effect as applied to any particular individual. The repeal of § 212(c) has no less retroactive effect as applied to Petitioner, who was convicted of his removable offense in 1979, than it does to Hem, who happened to be convicted more recently, but prior to the repeal of the statute.

Respondent points to further, more egregious distortions of this Court's retroactivity analysis, citing to *Wilson v. Gonzales*, 471 F.3d 111 (2nd Cir. 2006), *Carranza-de Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007) and *Mbea v. Gonzales*, 482 F.3d 276 (4th

Cir. 2007). In *Wilson* and *Carranza-de Salinas*, the Second Circuit and the Fifth Circuit, respectively, held that would-be § 212(c) applicants must make an *individualized, subjective showing of actual reliance* on the availability of such relief prior to its repeal. *See Wilson*, 471 F.3d at 122 *and Carranza-de Salinas*, 477 F.3d at 205. The Fourth Circuit in *Mbea* goes even further by requiring the existence of a *quid pro quo* agreement. *See Mbea*, 482 F.3d at 281-282. These evidentiary requirements effectively render the "presumption" against statutory retroactivity meaningless by shifting the evidentiary burden to the applicant.

Moreover, Respondent's arguments bring to light the fact that there are even intra-circuit inconsistencies regarding the "reliance requirement." Res. Opp. at 9 n.3. One such conflict exists within the Ninth Circuit, where that Court held in *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002) that a *quid pro quo* agreement is required and then subsequently held in *Hernandez de Anderson v. Gonzales*, 497 F.3d 927 (9th Cir. 2007), that an applicant need only demonstrate objectively reasonable reliance. While this Court does not sit to resolve intra-circuit disputes, the above example serves to further illustrate the general confusion and inefficiency which have arisen from the erroneous imposition of a reliance requirement onto the retroactivity analysis framework and thus further underscores the need for this Court's intervention.

3. Respondent contends that the Third Circuit Court of Appeals in *Atkinson*, 479 F.3d at 230 n.7,

"acknowledged" that a person who had not acquired seven years of unrelinquished domicile as of the date of his conviction "might be precluded from relief under Section 212(c)." Res. Opp. at 10. This is a misstatement of the Court's discussion. In a footnote, the Court noted the government's argument that stop-time provisions enacted as part of IIRIRA, interrupted the accrual of Atkinson's unrelinquished domicile and then expressed its disagreement, stating "we are inclined to believe that [stop-time provisions] apply *only* to cancellation of removal, 8 U.S.C. § 1229b(d)(1), and *not* to aliens seeking a discretionary waiver under former section 212(c)." *Id.* (emphasis added).

4. In opposing Petitioner's alternative argument that he could establish reasonable reliance, Respondent conflates objectively reasonable reliance with individualized, subjective reliance (Res. Opp. at 11-13), contending that Petitioner cannot show reasonable reliance because he has not made an individualized showing of any affirmative step he took in reliance on the availability of § 212(c) relief. Unlike a subjective, actual reliance requirement, objective reliance does not require the applicant to produce evidence of reliance; rather, the applicant can demonstrate objective reliance if the Court can conclude that it would have been reasonable under a particular set of circumstances for the applicant to rely on the availability of § 212(c) relief. *See Hernandez de Anderson*, 497 F.3d at 940; *Hem v. Maurer*, 458 F.3d at 1199; *Ponnapula v. Ashcroft*, 373 F.3d 480 (3rd Cir. 2004).

Respondent contends that Petitioner cannot demonstrate a "viable claim" of objective reliance on the availability of § 212(c) relief on the basis of its contention that it is not reasonable to conclude that Petitioner delayed affirmatively applying for § 212(c) relief in reliance on its continued availability for the purpose of accumulating greater equities over time, citing the fact that Petitioner's conviction occurred 17 years prior to the repeal of § 212(c). Res. Opp. at 13. Respondent attempts to distinguish Petitioner's case from *Carranza-de Salinas*, 477 F.3d at 202, *Wilson*, 471 F.3d at 113, and *Restrepo v. McElroy*, 369 F.3d 480 (2nd Cir. 2004), respectively, where the time between the last conviction and the repeal of the statute was approximately 3 or 4 years. Respondent's contentions are without merit. Petitioner is not required to make an actual showing of reliance; rather, the proper inquiry is whether it would have been reasonable for him to rely on the availability of § 212(c) relief in waiting to affirmatively file for such relief. *See Hem*, 458 F.3d at 1199 (where the Court's finding of objective reliance turned on the fact that it *would have been reasonable* for Hem to forgo his right to appeal in reliance on the availability of § 212(c) relief, not whether he *actually relied* on the availability of such relief in forgoing the appeal).

Given that an applicant's equities are paramount in offsetting the severity of his crime, it is reasonable to presume that an applicant such as Petitioner, who was convicted of three counts of drug trafficking crimes, would desire to accumulate as many equities

as possible in order to increase his chances of success before bringing himself and his conviction to the attention of the authorities. The Respondent's assertion that "it is most reasonable to conclude that petitioner . . . was . . . simply hoping that the government would not try to remove him on account of his conviction on three counts of drug trafficking" (Res. Opp. at 13) is pure conjecture and, and even if true in fact, does not negate the objective reasonableness of an applicant delaying his affirmative application for many years for the purpose of accumulating sufficient equities to counterbalance his very serious offense. Furthermore, Respondent's contention that Petitioner could have affirmatively applied for § 212(c) relief after the effective date of AEDPA (Res. Opp. at 13) is without merit because it ignores the fact that AEDPA eliminated § 212(c) relief for persons deportable for controlled substance and aggravated felony offenses. *See* AEDPA § 440(d).

5. Finally, in attempting to rebut Petitioner's Equal Protection argument, Respondent conflates the *Landgraf* retroactivity analysis with the rational basis that the Constitution requires in order for the government to treat similarly situated persons differently. Res. Opp. at 13. As discussed at length in the petition, there is absolutely no rational basis for allowing aliens who accepted plea offers to retain eligibility to apply for § 212(c) relief, while denying the same eligibility to aliens who were convicted at trial. Cert. Pet. at 34-36.

CONCLUSION

For all the foregoing reasons, and for those presented in the petition, the petition for writ of certiorari should be granted.

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